Supreme Court, U.S.
FILED
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NO. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1999

JOSEPH MCLAREN,
Petitioner

v.

THE STATE OF TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH COURT OF APPEALS, BEAUMONT, TEXAS

PETITION FOR WRIT OF CERTIORARI

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FIRST QUESTION PRESENTED FOR REVIEW

DOES REVIEW UNDER A HARMLESS ERROR STANDARD VIOLATE THE DUE PROCESS RIGHTS OF THE DEFENDANT WHEN THE TRIAL COURT FAILS TO COMPLY WITH THE MANDATED ADMONISHMENTS OF THE RANGE OF PUNISHMENT DURING A PLEA OF GUILTY.

SECOND QUESTION PRESENTED FOR REVIEW

CAN A COURT PRESUME THAT JUST BECAUSE A PERSON IS IN THE COURT ROOM DURING A LEGAL PROCEEDING THAT THEY TOTALLY UNDERSTAND ALL THE LAW AND PROCEEDINGS BEING USED AGAINST THEM.

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Petitioner respectfully requests that a writ of certiorari issue to the Court of Appeals for the Ninth Appellate District of Texas at Beaumont, Texas, to permit this Honorable Court to review the decision and judgment of Joseph Allen Mclaren vs. The State of Texas Cause Number Appellate number 97-03-493-CR appealed from the 9th District Court of Montgomery County Texas Trial Cause Number 97-03-00496.

DECISION BELOW

Petitioner was indicted under the TEX. PENAL CODE 22.021(a)(1)(B) Vernons 1997 for the offense of aggravated sexual assault of a child.

The Petitioner entered a plea of guilty to a jury and after hearing evidence, the jury found the Petitioner guilty and assessed punishment at fourteen (14) years in the Institutional Division of the Texas Department of Corrections.

The Ninth Court of Appeals affirmed Petitioner's case on July 28, 1999. No Motion for Rehearing was filed. Petitioner-Applicant's Petition For Discretionary Review to the Texas Court of Criminal Appeals was refused on December 10, 1999.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. Sec. 1257(a) providing jurisdiction to review "final judgments.... rendered by the highest Court of a State in which a decision could be had....by writ of certiorari, when any title, right, privilege, or immunity is specifically set up or claimed under the Constitution ... of the United States."

Petitioner's U.S. Constitutional Fourteenth and Sixth Amendment Due Process rights were violated when the trial court failed to admonish him on the full range of punishment.

This petition is timely filed, by placing it in the United States mail by March 10, 2000.

CONSTITUTIONAL PROVISIONS AT ISSUE

The constitutional provisions that form the basis for Petitioners' contentions are:

U.S. Constitution Amendment XIV.
U.S. Constitution Amendment VI.

Nor shall any state deprive any person of life, liberty, or property, without due process or equal protection of the law.....

PERTINENT TEXAS LAW

TEX. CODE CRIM. PROC. 26.13 :

(a) Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of:

1. The range of punishment attached to the offense;

TEX. RULES. APPELLATE PROC. 44

> (a) Constitutional Error. If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgement of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

(b). Other Error. Any other error, defect, irregularity, or variance that does not affect substantial rights mustbe disregarded.

CONCISE STATEMENT OF THE CASE

Questions Raised and Rejected in Courts Below

Petitioner claims that he was denied the federal protection of the United States Constitution due process of law by the failure of the trial court to tell him of the range of punishment prior to accepting his plea of guilty.

Facts Material to the Question Presented

The Texas Court of Criminal Appeals refused to grant review of the Ninth Court of Appeals decision upholding the Conviction of the Petitioner.

The Petitioner entered a plea of guilty to a jury for the offense of Sexual Assault of a child. The trial court failed to admonish the Petitioner as to the range of punishment. The Ninth Court of Appeals held that the failure by the Court to admonish the Petitioner as to the range of punishment was harmless error and any analysis should be conducted under **TEX. R. APP. PRO. 44(b)** and the voir dire examination by Petitioner's trial counsel and the voir dire conducted by the State of Texas apprized the Petitioner of the range of punishment and as such he was not harmed.

FIRST QUESTION PRESENTED FOR REVIEW

DOES REVIEW UNDER A HARMLESS ERROR STANDARD VIOLATE THE DUE PROCESS RIGHTS OF THE DEFENDANT WHEN THE TRIAL

COURT FAILS TO COMPLY WITH THE MANDATED ADMONISHMENTS OF THE RANGE OF PUNISHMENT DURING A PLEA OF GUILTY AND DOES NOT MAKE A FINDING BEYOND A REASONABLE DOUBT THAT THE ERROR DID NOT CONTRIBUTE TO THE CONVICTION OR PUNISHMENT.

SECOND QUESTION PRESENTED FOR REVIEW

CAN A COURT PRESUME THAT JUST BECAUSE A PERSON IS IN THE COURT ROOM DURING A LEGAL PROCEEDING THAT THEY TOTALLY UNDERSTAND ALL THE LAW AND PROCEEDINGS BEING USED AGAINST THEM.

REASONS FOR GRANTING REVIEW OF QUESTION ONE

THE TEXAS COURT OF CRIMINAL APPEALS REFUSAL TO HEAR THE CONSTITUTIONAL COMPLAINTS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT. U.S.S.CT.R. 10(c).

The court of appeals incorrectly held that it was harmless error for the trial court to fail to affirmatively advise a defendant who enters a plea of guilty as to the range of punishment as required under 26.13(1) Tex Code Crim. Pro. When there is no evidence or showing that the Petitioner had any knowledge of the punishment range is a violation of United States Constitution Sixth Amendment and Fourteenth Amendment fundamental due process as stated in *Boykin vs. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.ed. 2d 274 1969).

ARGUMENT AND AUTHORITIES

The Supreme Court in 1969 wrote *Boykin vs. Alabama* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 1969) This opinion has stood the test of time and has not been varied from in 30 years. The Texas Court of Criminal Appeals Courts in *Aguirre-Mata vs. State* 962 S.W.2d. 264 (Tex.Crim. App 1999) declared that any violation of **TEX CODE CRIM PROC. 26.13** requires a harm analysis under **TEX R. APP. PROC. 44.1(b)**. This is inconsistent with the United States Supreme Court. This Court in an attempt to limit appeal issues, has kicked the legs out from under *Boykin* thinking that the *Boykin* opinion does not stand unaffected.

It is hard to imagine how the Court of Appeals overturned 100 years of precedent and ignored the Sixth Amendment, Due Process and Equal Protection of the law, of the United States Constitution when there has been no compliance with a criminal procedure. It is a fundamental right that the court show whether a plea of guilty is voluntary. To state that the court should conduct a harm analysis to determine whether a defendant's rights have been violated at the best sets up a grey area of the law and at the worst balances justice on top on the tip of a needle.

It is further argued that the Court of Appeals failed to even follow the law as it relates to TEX. R. APP. PROC. 44.1 (b). The Court did not conduct the proper proceeding in failing to find beyond a reasonable doubt that the error was harmless.

The supreme law of this country still reads when there is no compliance with the law it can not be viewed under a harmless error standard. *Boykin* still stands for the proposition that error occurs when the constitutionally required admonishments are not spread upon the record. This does not mean that someone besides the Judge explained the range of

punishment but that the Court explained and insured in the record that the Petitioner understood the admonishments.

Here we have no indication that the Petitioner was aware of the range of punishment. The court went through all the admonishments except the range of punishment. The Court made no finding beyond a reasonable doubt as required by the Texas Rules of Appellate Procedure 44.1(a) that the error was harmless.

It is requested that the Honorable Court grant review on this issue and rule that *Boykin v. Alabama* still stands as the law of the land and a harmful error analysis is not necessary when the Court does not comply with the admonishment under **TEX CODE CRIM. PROC. 26.13(1)**.

REASONS FOR GRANTING REVIEW OF QUESTIONS TWO

THE TEXAS COURT OF CRIMINAL APPEALS REFUSAL TO HEAR THE CONSTITUTIONAL COMPLAINTS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT. U.S.S.CT.R. 10(c).

In the case at bar the Texas Court reasoned that since the Defendant was in the Court room during jury voir dire he understood the range of punishment that the charges carried against him.

In the case of *Memphis v. Furlong* 170 F3rd. 980, (10th Circuit 1999), and other cases decided in the various circuits the one thing that the Courts require if a person is going to represent themselves is that they know the range of punishment for the crime they are accessed.

The same procedure should apply in the case at Bar. Since the admonishment as to punishment by the judge may have changed the Defendant's mind from doing a plea to trying the case, since many accused persons plead guilty just to get the case over with, and in hope of getting a lenient sentence, such as probation, not understanding all the consequences of the plea.

Therefore, petitioner is requesting that the Honorable Court remand this case for proceeding as set forth in the Texas code of Criminal Procedure.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, Petitioner respectfully pray that the Court grant his petition and issue a writ of certiorari to the Court of Criminal Appeals Ninth District to review the question here presented.

Respectfully submitted,

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APPENDIX A

RECEIVED AND FILED
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AT____ O'CLOCK ___M
FEB 7 2000
BARBARA ADAMICK
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BY (Illegible)

COURT OF APPEALS
STATE OF TEXAS
Ninth District

Chief Justice
RONALD L. WALKER

Clerk
CAROL ANNIE FLORES

Justices
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EARL B. STOVER

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February 3, 2000

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RE: Court of Appeals Number: 09-97-00493-CR
Trial Court Case Number : 97-03-00496 CR

Style: McLaren, Joseph Allen
v.
The State of Texas

The Appellant's Motion to Withdraw or Stay the Mandate in the above styled and numbered cause was granted this date with the notation "FOR 90 DAYS". The District Clerk is to return the original Mandate, issued December 20, 1999, to the Clerk of this Court upon receipt of this letter.

Sincerely,

CAROL ANNE FLORES,
Clerk

cc: Barbara Adamick
District Clerk
Montgomery County
P.O. Box 2985
Conroe, TX 77301

APPENDIX B

FILED
JUL 28 1999
CAROL ANNE FLORES, CLERK
COURT OF APPEALS
NINTH DISTRICT
Beaumont, Texas

In The
COURT OF APPEALS
NINTH DISTRICT OF TEXAS AT BEAUMONT

NO. 09-97-493- CR

JOSEPH ALLEN MCLAREN, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 97-03-00496-CR

OPINION

Joseph Allen McLaren entered a plea of guilty to the offense of aggravated sexual assault of a child.[1] Punishment was assessed by the jury at fourteen years confinement in the Institutional Division of the Texas Department of Criminal

---

[1] *See* Act of May 29, 1995, 74th Leg., R.S., ch. 318, § 7, 1995 Tex. Gen. Laws 2734, 2737 (amended 1997) (current version at TEX. PEN. CODE ANN. § 22.021(a)(1)(B) (Vernon Supp. 1999)).

Justice.

On appeal, McLaren argues his plea of guilty was not knowing and voluntary because the trial court failed to admonish him as to the consequences of his plea, specifically as to the range of punishment.[2] The record verifies the trial court failed to admonish McLaren of the range of punishment as required by TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(1) (Vernon 1989).[3] Prior to accepting McLaren's plea of guilty, the trial court asked the following questions:

> THE COURT: It's my understanding that you have waived your right to a jury trial in the guilt and innocence stage. You're pleading guilty at this time, and you wish to go to the jury for punishment. Is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: I want to go ahead and do the admonishments and competency determination at this time. Have you ever been committed into a psychiatric institute?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Have you ever been in the care of a psychiatrist or psychologist for any

---

[2]We note that under *Flowers v. State* 935 S.W.2d 131 (Tex. Crim. App. 1996), we have jurisdiction to consider the voluntariness of a plea.

[3]**Art. 26.13 Plea of Guilty**

(a) Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of:

(1) the range of the punishment attached to the offense

kind of a mental or emotional disorder?

THE DEFENDANT: Yes. I've been in Baylor College of Medicine about six or seven months now in their sex program.

THE COURT: You have been in their sex program?

THE DEFENDANT: Yes, I have.

THE COURT: What's the name of the physician that's treating you?

THE DEFENDANT: Kayla - What's her last name? Michael D. Cox is over at the Institute.

THE COURT: Are you under any medication at this time?

THE DEFENDANT: No, I'm not.

THE COURT: Are you sober?

THE DEFENDANT: Yes, sir.

THE COURT: Are you under the influence of any drugs?

THE DEFENDANT: No, sir.

THE COURT: Can you read and write the English language?

THE DEFENDANT: Yes, sir.

> THE COURT: Have you been able to communicate with your attorney?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Counselor, you have met with your client, I assume, and you've counseled with him; and do you have an opinion as to whether or not he's competent to stand trial?
>
> [DEFENSE COUNSEL]: Yes, your Honor, I feel he is.[4]
>
> THE COURT: Well, the Court finds that you are competent to stand trial and accepts your plea of guilty.

No further admonishments were made by the court. Therefore, it is clear that the trial court neglected to inform McLaren of the range of punishment prior to accepting his plea. We find the trial court committed error in failing to do so.

In *High v. State*, the Court of Criminal Appeals held that a failure to admonish a defendant under article 26.13(a)(1) is not 'automatic[ally] reversible error, without regard to harm." 964 S.W.2d 637, 638 (Tex. Crim. App. 1998). Instead, an appellate court is required to conduct a harm analysis pursuant to Rule

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[4] **44.2 Reversible Error in Criminal Cases.**

(a) *Constitutional Error.* If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

(b) *Other Errors.* Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

44.2 of the Texas Rules of Appellate Procedure. *Id*. TEX. R. APP. P. 44.2.[4] In a case where the trial court has failed to admonish a defendant pursuant to Art. 26.13(a)(1), the error is reviewed under Rule 44.2(b). *Aguirre-Mata v. State*, No. 0762-98, slip op, at 7, 1999 WL 330240, at *4 (Tex. Crim. App. May 26, 1999). If the error does not affect the appellant's substantial rights, it must be disregarded. *See* TEX. R. APP. P. 44.2(b). In *Carranza v. State*, the Court announced the following Rule 44.2(b) harm analysis as applicable to Art. 26.13:

> [W[e understand Rule 44.2(b) to require that when there has been no substantial compliance with the admonishment requirements of Art. 26.13, a defendant is required to show *no more* than that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court.

980 S.W.2d 653, 658 (Tex. Crim. App. 1998). Therefore, following the guidance of the Court of Criminal Appeals, we now proceed to apply a Rule 44.2(b) harm analysis.

The State argues McLaren's plea was knowing and voluntary because the trial court, prosecutor, and defense counsel each stated the applicable range of punishment during voir dire. We agree. McLaren elected to have a jury determine punishment. Prior to McLaren's plea of guilty, during voir dire, the trial court, prosecutor, and defense counsel, each, independently, informed the venire panel of the appropriate range of punishment. Thus, the record of the voir dire examination affirmatively shows that McLaren had knowledge of the applicable punishment range prior to the entry of his plea.

We conclude, therefore, that McLaren was aware of the

range of punishment for the offense of aggravated sexual assault of a child, that he entered his plea of guilt voluntarily and knowingly, and that the court's failure to admonish McLaren pursuant to article 26.13(a)(1) did not affect his substantial rights. *See Rachuig v. State*, 972 S.W.2d 170, 176 (Tex. App.-Waco 1998, pet. ref'd. (record indicated defendant had full knowledge of the applicable range of punishment where such was stated during voir dire). Accordingly, we disregard the trial court's error in failing to give McLaren the punishment range admonishment. *See* Tex. R. App. P. 42.2(b).

We overrule McLaren's sole point of error and affirm the judgment of the trial court.

AFFIRMED.

EARL B. STOVER
Justice

Submitted on June 10, 1999
Opinion Delivered July 28, 1999
Publish

Before Walker, C.J., Burgess and Stover, JJ.